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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AEROVIAS INTERAMERICANAS DE PANAMA, S.A., et al.,
and
LINEAS AEREAS DE NICARAGUA, S.A.,
Petitioners

v.

BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, acting as the DADE COUNTY PORT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Aside from reasserting the obvious fact that this case was not tried or decided on issues of "reasonableness" or "discrimination" as such, the brief of respondent is devoted principally to defending the lower court's decision on the theory that petitioners' rights under Article 15 of the Chicago Convention are fully

maintained by subjecting all Latin-American airlines' aircraft to the same airport charges as are imposed on the aircraft of one small United States international airline.

As to the bilateral agreements of seven of petitioners the respondent's brief (Resp. Br., pp. 19-21) serves only to underline the fact that the lower court omitted to pass on them.

I.

"REASONABLENESS" OR "DISCRIMINATION" AS SUCH ARE NOT ISSUES

Respondent's brief is directed in part at least to the demolition of its own straw men. "As it states (Resp. Br., pp. 9, 11), relief was not claimed in, or granted by the district court on any theory of unreasonableness or unjust discrimination. Petitioners relied in the court of appeals and rely here solely on the Chicago Convention and the bilateral agreements with seven of the petitioners. Of course, no one can duck the fact that the differential in landing charge rates exacted of petitioners on the one hand and of Pan Am, by far the largest United States or foreign operator of international service, results in grave prejudice to petitioners' treaty right to opportunity to compete on an equal basis with United States aircraft, at least so far as airport landing charges are concerned.

A. Enormous Discrepancy in Airport Charges Is Not Based Principally on Volume Discounts

In passing, it is pertinent to refute the assertion of respondent (Resp. Br., p. 19) that the enormous discrepancy in the average landing charges paid by petitioners and by Pan Am, respectively, is "based principally" on the fact that Pan Am enjoys a much larger

volume of landings and the charges to both petitioner and Pan Am are computed under rate schedules that are different but both of which use a monthly reducing sliding scale (Resp. Br. p. 10).

As shown on the following pages, compared with the average charge to Pan Am computed under the initial and highest charge brackets of the rate schedule of Pan Am (and others of the Big Four), the average charge to petitioner TAN[1] for a typical month and for 11 landings was 840 per cent greater. We may concede that the relative volume of Pan Am as compared with that of each of the petitioners accounts for the additional average discrepancy included in the 1800 per cent referred to in the Petition for Certiorari (pp. 15, 27a).

[1] Petitioner Transportes Aereos Nacionales, S.A. of Honduras commonly known as TAN.

ACTUAL CHARGES TO TAN FOR AIRCRAFT LANDINGS AT MIAMI INTERNATIONAL AIRPORT IN MAY, 1960

Under Dade County Port Authority's Resolution No. 56 (R. 652 et seq.) for the Landing of 32 C-46's (48,000 lb.) and 9 DC-6-B's (93,000 lb.)—weights stipulated (Stip. Ex. 25)

	Total for 41 landings	Average chg. for 41 landings
Landings (Stip. Ex. 9, p. 62)	[illegible]	
Passenger terminal charges (Stip. Ex. 9, p. 62)	787.00	
Cargo terminal charges [1] (Stip. Ex. 9, p. 62)	409.00	
Indirect charges:		
Gasoline and oil (Pl. Ex. 15; Sched. for May, 1960)	611.73	
Meals catering (Pl. Exh. 26, attached Ex. 1)	63.86	
	[illegible]	[illegible]

CHARGES "THAT WOULD BE PAID BY ITS [UNITED STATES'] NATIONAL AIRCRAFT ENGAGED IN SIMILAR INTERNATIONAL AIR SERVICLS" SUCH AS THOSE OF PAN AMERICAN FOR LANDINGS OF THE SAME AIRCRAFT IN THE SAME NUMBER IN THE SAME MONTH

Under the Rate Schedule Contained in the Big Four Lease Agreements (Art. II, para. 4) as Set Out in Stip. Ex. 2 (R. 632-634)

32 C-46s (48,000 lb.) computed as follows:
31 landings equal 1 daily schedule for May:

Basic chg. for 30,000 lb. aircraft	$200.00		
Excess over 30,000 lb.: 18,000 lb.			
At $1.00 per thousand 18,000 lb.	18.00		
		$218.00	
1 landing at 1/30 of monthly charge		7.27	
Total for 32 C-46's			$225.27

9 DC-6 B's (93,000 lb.) computed as follows:
One daily schedule per month:

Basic charge for 30,000 lb. aircraft	200.00		
Excess:			
Over 30,000 but not more than 75,000 lb.:			
At $1.00 per thousand: 45,000 lb.	45.00		
Over $75,000 but not more than 100,000 lb.:			
At $0.75 per thousand: 18,000 lb.	13.50		
Total for one daily schedule per month	$258.50		
Fraction (9/30) of charge for daily schedule per month where operated on less than daily basis		77.53	
			302.82 7.39

[1] Cargo terminal charges were eliminated by the Airport Authority on October 1, 1961 (See R. 692-749 1/2 and papers attached thereto).

B. The Letter of the Civil Aeronautics Administrator Is Entitled to No Weight Here

Respondent apparently founds much of its argument on the 1957 letter of the Civil Aeronautics Administrator (Resp. Br., pp. 13-14). The same letter was also quoted at length by the court of appeals (Pet. App., pp. 7a-9a) but not made a ground of decision by that court. This letter was written in reply to an informal complaint ledged by one of petitioners' present attorneys on behalf of four domestic and four foreign airlines (two of which are petitioners here). The question there involved was plainly different because the complaint was based solely on the Federal Airport Act. The quoted letter was manifestly not the result of an adversary proceeding, and the validity of a number of the factual premises is substantially impaired by evidence adduced in the trial of this case. No judicial review was possible under the provisions of the Civil Aeronautics Act of 1938 as that Act then read.

C. Florida Court Decision Held That Charges Unjustly Discriminate

Insofar as the Administrator's letter proceeds on the theory that the Resolution 56 rates are not unreasonable or discriminatory, the letter is robbed of any weight by the subsequent proceedings in the Florida courts, in which the same rates were successfully challenged by domestic airlines as being discriminatory and unreasonable. In *Northeast Airlines, Inc.* v. *Walter Weiss*, 113 So. 2d 884, cert. denied 113 So. 2d 772 (Fla.),[2] in which respondent's commissioners,

[2] Respondent's brief is silent as to this decision, although cited by petitioners (Petition for Cert., p. 15) and not lacking in pertinence to respondent's argument.

sued as such, were defendants, the plaintiff challenged such charges as "discriminatory, unreasonable, unjust and unfair" and as being in violation of the Federal Airport Act. The complaint was held to state a cause of action over the objection that administrative remedies had not been exhausted. The case was settled before trial. In *Regina Cargo Airlines, Inc.* v. *Board of County Commrs.*, N. 18,133, U.S. Ct. of App. for the Fifth Circuit, the United States domestic airline cases to which respondent refers (Resp. Br., p. 8, note 5) were also settled on the same basis as the *Northeast* case, *supra*.

The question whether the Resolution 56 rates of the County Port Authority are unreasonable and discriminatory is, to say the least, still an open question. Certainly that issue is not foreclosed by the letter of the Civil Aeronautics Administrator.

II.

NEITHER THE CONVENTION NOR OTHER FEDERAL LAW AFFORDS BASIS FOR THE LOWER COURT'S CLASSIFICATION

Insofar as the respondent's brief purports to meet the Petition for Certiorari, it contends that the decision of the court below proceeds on a single ground: That Article 15 of the Convention permits a classification of United States aircraft engaged in international air service dependent on whether or not the owners of such aircraft are parties to leasing contracts with the respondent (Resp. Br., pp. 2, 6, 7, 8, 9, 14, 15, 18, 21, 22-23).

A. The Chicago Convention Bars the "Classification" of National Aircraft Upon the Basis Approved by the Lower Court and Here Urged by Respondent

Article 15 of the Chicago Convention recognizes only the following distinctions in comparing foreign aircraft with national aircraft for the purpose of ascertaining entitlement to parity of charges:

(1) The division by Article 15 resulting from inclusion in Article 15(a) of "aircraft *not* engaged in scheduled international air services" and in Article 15(b) of "aircraft engaged in scheduled international air services". (Emphasis supplied.)

(2) The sub-divisions under Article 15(a) relating to non-scheduled aircraft further requiring that the comparison be with (a) "national aircraft of the same class" and (b) with "national aircraft . . . engaged in similar operations". Other than "national" there is no reference to ownership of the aircraft. Neither is there any reference to contracts or contract rights of persons who may happen to be the owners or operators of the aircraft.

(3) The division under Article 15(b), relating to scheduled aircraft, goes to only one basis of comparison: whether the foreign aircraft and national aircraft (both "engaged in scheduled international air services" in order to be in Article 15(b)) are also engaged in "similar" international air services.[3]

[3] The reason for the substantial difference in language of paragraphs (a) and (b) of Article 15 is not clear. It may be that it was deemed necessary because of the form of the definitions of "air service" and "international air service" contained in Article 96.

In any event, petitioners' aircraft traffic into the Miami airport there is included an estimated portion of only 3 per cent that is non-scheduled.

There is here no room for denying petitioners' aircraft the right to landing charges not higher than those paid by aircraft of Pan Am engaged in similar international air services. Clearly the Convention affords no authority for classification of national aircraft because their owners have entered into contracts with the airport that present "infraterritorial inconsistencies" (Pet. App., p. 11a; Resp. Br., p. 17).

B. Accepted Rules of Construction Require That Effect be Given to the Absence of Any Reference in Art. 15(b) to "Class" of Aircraft

It is conceded that the aircraft of Pan Am charges for which are claimed by petitioners as applicable to their aircraft are engaged in "scheduled" and "similar" "international air services", the only basis of comparison set forth in Article 15(b). It is submitted that *exclusio unius* be given effect here. Even if the reference to "class" contained in Article 15(a) be regarded as permitting classification such as the lower court opinion approves (this despite the obvious reference to "class" of aircraft and not to class of ownership or class of contract under which operated), the absence of any such reference in Article 15(b) requires that the parties attached different meaning to Article 15(b).

Again, even if the language of the Convention might reasonably be said fairly to admit of two interpretations, one restrictive of private rights claimed thereunder, the other liberal and furthering the priyate rights, the more liberal construction is to be adopted. See cases cited (Petition, p. 22).

Respondent's quotations from the opinion of the court below (Resp. Br. bot. p. 14) make it clear that the court simply rewrote the treaty with a broad pen.

C. There Is No Merit in Respondent's Arguments Attempting to Justify the Classification of Aircraft of the Big Four So as to Exclude Landing Charges Paid by Them from the Standard of Comparison Under Article 15(b) of the Convention

Respondent argues that enforcement of the treaty rights claimed by petitioners would conflict with other Federal statutes and that it would result in a preference to petitioners as against United States airlines other than those of the Big Four (Resp. Br., pp. 8, 15, 22-23).

(1) *Enforcement of the treaty rights claimed by petitioners involves no conflict with Federal statutes.*—Respondents invoke the proscription of unjust discrimination contained in the Federal Airport Act, the Surplus Property Act of 1944, as amended, and a National Park Service statute (Resp. Br., pp. 22-23). This is a most curious argument. It is apparently founded on the erroneous premise that the prohibitions against "unjust discrimination" found in the several Acts, including the Federal Airport Act, are nugatory and that United States airlines cannot obtain any relief from the discrimination resulting from the landing charges enjoyed by the Big Four. The erroneous premise of respondent apparently traces to its reliance on the Civil Aeronautics Administrator's letter. As shown above, the letter of the Civil Aeronautics Administrator is a weak reed.

Furthermore, the respondent's premise is belied by the decision of the Florida court cited in the Petition and completely ignored by respondent. *Northeast Airlines v. Walter Weiss*, 113 So. 2d 884, cert. denied, 113 So. 2d 772 (Fla.) As pointed out in the Petition, page 15, and herein (*supra*, pp. 6-7) the Florida court

in that case specifically upheld a complaint charging discrimination in the Dade County Port Authority charges under Resolution 56.

(2) *The respondent's argument as to Senate intent in advising ratification of the Chicago convention is based apparently on a fantastic anachronism.*—

The respondent points out that the Federal Airport Act was enacted shortly before the Senate advised ratification of the Chicago Convention (Resp. Br., p. 22) and suggests that the Senate could not, in advising ratification, have intended to confer on foreign airlines, rights "greater" than those secured to United States airlines by the "unjust discrimination" proscription contained in the Federal Airport Act. This assumes that the Federal Airport proscription was then known to the Senate to give no protection to United States airlines against the preferential landing charges enjoyed by the Big Four. This knowledge, so imputed to the Senate, in turn is apparently based by respondent on the determination contained in the letter of the Civil Aeronautics Administrator 11 years later that United States airlines were entitled to no such relief under the Federal Airport Act. At least, respondent cites no other basis for considering the proscription of the Federal Airport Act nugatory.

Thus the whole argument is founded on the attribution to the Senate of knowledge in 1946 of an administrator's letter not written until 1957.

(3) *Circumstances at the time ratification was advised afford no support for respondent's classification.*—

Referring to the circumstances existing at the time of advice and consent to ratification by the Senate (*Ross*

v. *McIntyre*, 140 U.S. 453, 475; *Strother* v. *Lucas*, 12 Pet. 410, 438) we find nothing to put the Senate on notice that the Miami airport would attempt any such invidious differential in charges exacted of landing aircraft, as is here involved. The Senate advised ratification of the Chicago Convention on July 25, 1946; it was duly ratified by the President on August 6, 1946 (61 Stat. 1180). At that time the important circumstances existing at Miami were as follows:

(a) The long-existing Habana Convention, Art. XXIV, had since 1931 imposed, and was still imposing, as part of the municipal law of the United States, and as to aircraft of at least five of the States of petitioners here parties, the same restriction that is imposed by Article 15 of the Chicago Convention (see Petition, p. 28, note 10); (b) The only airport charges for use of the Miami airport by international aircraft then established by the airport were those contained in the 20-year contracts of Pan American and the El Salvador airline, Taca (Cf. Petition, p. 13; Resp. Br. 15) dated December 11, 1945, and February 27, 1946, respectively (R. 377-378); (c) Airport charges for other international aircraft apparently had not yet been established by the Port Authority,[4] but the Pan Am and Taca contracts contemplated that the Port Authority might at any time enter into similar contracts with other airlines (Pet. App., p. 19a); (d) None of the petitioners was as yet flying into Miami.

[4] The airport publicly commenced operation on March 3, 1946, offering domestic service only. It was not until September 24, 1946, that the Port Authority, by Resolution No. 56, effective September 30, 1946, promulgated airport charges for domestic and international aircraft "except aircraft of lessees whose charges have been established by contract prior to the adoption of this Resolution" (R. 652). (Petition, App., p. 5a).

Hence, if we indulge the presumption that the Senate and the President, at the time of the ratification of the Chicago Convention, are presumed to have acted with knowledge of the circumstances surrounding the landing charges at the Miami airport, they necessarily contemplated that foreign aircraft, as they began flying into Miami, would be charged for landing at rates "not higher than" those that "would be paid" by Pan Am and Taca. It seems clear that there was, and is now, no basis for attributing to the Senate and the President a purpose to include in the Chicago Convention authority to permit or demand of foreign aircraft landing charges 800 or 1800 per cent higher than those collected from Pan Am or Taca. It was only *after* ratification of the Treaty that the airport Authority adopted its Resolution No. 56 establishing for aircraft, other than those of the Big Four and Taca, substantially higher landing charges.

It is this post-ratification set of airport charges applicable to little more than 3 per cent of the landings[*]

[*] The relative number of landings by United States aircraft in international service at Miami in the fiscal year 1958/1959, the latest year as to which figures are of record, are as follows (Stip. Ex. 12-B—Petition for Certiorari, App., p. 21a):

Total Landings by United States Aircraft in International Service

Airline	Number	Per cent
Pan American	8,196	87.10
National	907	9.63
Braniff	308	3.27
Total	9,411	100.00

Braniff's passenger traffic constitutes 2 per cent of the total international traffic at Miami.

of United States aircraft engaged in international air services that respondent contends pet tioners must look in establishing landing charges properly chargeable to petitioners under the Treaty.

D. Argument That Petitioners Will be Preferred Over United States Airlines Is Fallacious

Proceeding on the assumed premise that its airport rate structure is completely cleared of any violation under the Federal Airport Act and that hence no United States airline can acquire equality of airport charges with the Big Four, respondent here urges that if petitioners prevail they will obtain "rights greater than those secured to United States airlines" (Resp. Br., p. 22). Presumably this embraces both United States airlines engaged solely in domestic service and those engaged in international service.

The domestic airlines may, in law, have a perfect case for equality of airport charges under the doctrine of *Northeast Airlines* v. *Weiss*, supra. But that question is not here. Furthermore, as to domestic airlines the question is irrelevant because the preparatory work of the negotiators of the Chicago Convention establishes that the contracting States fully recognize that airport charges for international aircraft might under the Convention be made lower than those for domestic aircraft. The Commentary on the Development of the Individual Articles of the Convention (proceedings of the International Civil Aviation Conference, Department of State publication 2820, Vol. 2, p. 1383) states:

> "*Article 15, Airport and similar charges*, represents a combination of Articles 9 and 22 of the United States draft convention. The drafting

> committee was asked by the fifth meeting of Subcommittee 2 to revise Article 22 in the light of the instructions on Article 9 referred by the fourth meeting, to make it clear that *there is no obligation implied to treat domestic aircraft the same as international*. . . . (Emphasis supplied)

See also Minutes, Meeting of Subcommittee of Committee 1, November 10, 1944 (id., Vol. 1, p. 680).

As to the possibility that lower rates to petitioners than to United States airlines engaged in *international* service might result, respondent's argument can refer only to Braniff International Airways, Inc., the only United States airline which *has been* charged the same rates as petitioners. But respondent itself has rendered this argument academic. As pointed out in petitioners' motion in the Court of Appeals to supplement the record on appeal, respondent, as it admitted in its opposition (R. 725) under date July 1, 1961, entered into a new agreement with Braniff guaranteeing to the latter parity with any reduced rates that may ultimately be obtained by petitioners in this case (R. 700-703).

In *Todok v. Union State Bank*, 281 U.S. 449 (invoked by respondent (Resp. Br., p. 17)) the treaty rights claimed would have favored an alien homestead owner over "every citizen of Nebraska" (id., p. 456). Here, petitioners would be placed merely on a plane of equality with their major and principal United States competitors, Pan Am (and National when and if it resumes service to Cuba). Pan Am does 64.1 per cent and National 3.4 per cent of all international airline business at Miami (Pet. App., p. 20a). Respondent has already protected Braniff by the above mentioned contract.

III.

THE BILATERAL AGREEMENTS IGNORED BY THE COURT BELOW EVEN MORE CLEARLY ESTABLISH THE PARITY RIGHTS OF PETITIONERS

The district court had held that the bilateral Air Transport Services Agreements conferred the right of equality of airport charges upon seven of the ten petitioners, independently of the Chicago Convention (R. 391, 401, 426, 435). The court of appeals opinion gives no consideration to these executive agreements. One of the questions asserted in the Petition to be here involved was the effect of these bilaterals (Question No. 4, Pet., p. 3).

Respondent brushes aside this failure of the court of appeals to consider the seven bilaterals, on the argument that these Executive Agreements were merely dependent upon the Chicago Convention itself because they followed the form agreement adopted by the Chicago Conference. But Mr. W. L. Clayton, Assistant Secretary of State, at the Senate Foreign Relations Committee hearing on the Chicago Convention, pointed out that the Convention was a document *independent* of all other agreements drawn up at the Chicago Air Conference" (Petition, Appendix page 34a) (Emphasis supplied).

Respondent also appears to argue that the seven bilateral agreements were merely duplications of the airport provisions of the Chicago Convention. Therefore, respondent argues, it would be giving greater dignity to the bilaterals than the Convention itself, to enforce those treaty provisions; and that it would be "inconsistent" to grant relief under one treaty while denying relief under another. Respondent in effect argues that the provisions for equality of airport charges solemnly undertaken in the bilateral agree-

ments with Brazil, Colombia, Ecuador, Mexico, Panama, Peru and Venezuela were completely meaningless and mere scraps of paper.

The provisions of the bilateral agreements separately entered into with the above sovereign nations were more specific than the Chicago Convention and contained nothing comparable to Article 82 of the Convention upon which the court of appeals relied to nullify the effectiveness of the Convention. The seven bilateral agreements should be considered by this Court.

IV.

CONCLUSION

The Brief In Opposition filed by respondent presents no considerations which in any way militate against the obvious general importance of the federal questions presented in the Petition for Writ of Certiorari. Respondent's Brief fails more signally to fortify the grounds of decision of the court of appeals.

It is therefore respectfully submitted that this Court should exercise its supervisory powers in issuing a Writ of Certiorari to review the decisions of the Court of Appeals for the Fifth Circuit in these cases.

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January 1963

Certificate of Service

I, PHILIP SCHLEIT, one of the attorneys for the petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of January 1963, I served the foregoing Reply Brief on the respondent by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to Thomas G. Spicer, Esq. Assistant General Counsel, Dade County Port Authority, P. O. Box 59-2075 A.M.F., Miami International Airport, Miami, Florida; Chester Bedell, Esq. 1520 Barnett National Bank Building, Jacksonville 2, Florida; and Paul G. Hyman, Esq., 228 N. E. Second Avenue, Miami 1, Florida.

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